U.S. Department of Labor

Office of Administrative Law Judges
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In the matter of:	
KIRT T. BACH Claimant	
v.	
	Date: December 8, 2000
DEPARTMENT OF THE ARMY Employer,	Case No. 1995-LHC-2311
and	
ARMY CENTRAL INSURANCE FUND, Carrier.	

Appearances:

Leonard Buscemi, Esq.
For the Claimant

James Mesnard, Esq.
For the Employer/Carrier

Before: Mollie W. Neal
Administrative Law Judge

DECISION AND ORDER - - GRANTING BENEFITS[1]

This proceeding arises from a claim filed by Kirt T. Bach ("Claimant") for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended *(33 U.S.C. § 901 et seq.*) As incorporated by

[1] The following abbreviations will be used herein in citing to the record: "CX" - Claimant's exhibit; "EX" - Employer's exhibit; and "Tr." - designates pages from the transcript of the hearing in this matter.

the Non-Appropriated Fund Instrumentalities Act, *5 U.S.C. § 8171 et seq* (hereinafter collectively referred to as "the Act") for injuries sustained in the course of his employment with the Department of Army (the "Employer") on July 3, 1990.

A hearing was held before the undersigned in Washington, D.C. on June 7, 1999, during which Claimant's exhibits 1 - 99 were admitted without objection (Tr. 8). Employer's exhibits 1-32 and 34 were received into evidence. (Tr. 8). Employer's exhibit 37 was excluded from the record. Claimant objected to Employer's proposed exhibits 33, 35, and 36, which were surveillance video tapes. (Tr. 8-9). A ruling was reserved on the admissibility of these three exhibits, pending review by the Court. The surveillance tapes have been reviewed and are hereby admitted. It is a generally accepted principle that, in proceedings under the Act, the administrative law judge is not strictly bound by common law or statutory rules of evidence or by technical rules of procedure, and may investigate and conduct the hearing so as best to ascertain the rights of the parties. *Walker v. Newport News Shipbuilding and Dry Dock Co.*, 10 BRBS 101 (1979), *affirmed*, 618 F.2d 107 (4th Cir. 1980), *cert. denied*, 446 U.S. 943 (1980). Surveillance videotapes are admissible if probative and relevant to the material issues of Claimant's credibility and continuing disability, and if properly authenticated. *Walker v. Newport News Shipbuilding and Dry Dock Co.*, 10 BRBS 101 (1979); *Reed v. Tiffin Motor Homes*, 697 F.2d 1192 (4th Cir. 1982). In the case *sub judice*, the tapes were authenticated by the Employer's investigator, William Lowrance (Tr. 121), and the information contained there is relevant and material to the issues of fact relating to Claimant's physical ability to engage in work activity. Claimant maintains that these tapes represent evidence which is consistent, rather than inconsistent, with his testimony and other evidence already made a part of the record. Claimant argues that the events recorded on the tapes would only be relevant for purposes of impeachment of the credibility of the Claimant. That argument, however, relates more to the weight to be accorded the evidence rather than the issue of its admissibility. Therefore, I find that the tapes are admissible, and they are received into the record.

At the conclusion of the hearing, the record was left open for sixty days for the submission of post hearing briefs and wage calculations. (Tr. 231). By order dated August 9, 1999, time for submission of briefs was extended to September 10, 1999. Employer's brief was received in this Office on September 10, 1999. Accompanying Employer's brief were two exhibits, marked "A" and "B", consisting of data relating to average weekly wages and average hourly wages in 1990, respectively, for the positions which the Employer maintains represent suitable alternative employment. Both these exhibits are admitted into the record as Employer's exhibit 38 (formerly marked "A") and 39 (formerly marked "B"). Post Hearing Briefs

were submitted by the Claimant on September 13, 1999.[2]

I. Preliminary Statement

Claimant, who is sixty-three years of age, was born in Vietnam in 1937 and graduated from high school there in 1952. He speaks primarily Vietnamese, has a limited command of verbal usage of English, and has no other formal education. Claimant's first employment was as a soldier in the Vietnamese Army. He spent six years fighting in the Vietnam war. Between 1961 and 1972, he worked for a Vietnamese company that provided fire training to U.S. personnel and Vietnamese civilians employed on an U.S. Air Base. From 1972 to 1975, he worked in shipping and receiving for a division of Caterpillar Company, in Vietnam. He came to the United States in 1975, where he worked odd jobs as a machinist, a laborer in a lumberyard, and in a shoe factory. In 1985, he took a job as a janitor with the Sheraton hotel in the evening and as a maintenance worker with the Employer (Pentagon Officer's Athletic Club ["POAC"]) during the day.(CX 6, at pp. 22-25). His duties as a maintenance worker with the Employer included repairing and painting walls, repairing washer and drying machines, and exercise/athletic equipment, some light plumbing, and changing lights. (CX 6 at p.25; Tr. 112-113). Claimant testified that this work was strenuous and involved heavy lifting (CX 6, at p. 25; Tr. 38)

In the early 1980's, while working as a warehouseman in New Mexico, Claimant injured his back and underwent discectomy at the L4-L5 level. In August of 1986, while working as a custodian at the Sheraton Hotel he injured his back again, and had a laminectomy at the L4-L5 level. The instant claim arises out of an injury sustained on July 3, 1990, when he was working at the Pentagon as a maintenance man, fell off a ladder, hitting his head and injuring his back.

In the instant action, the Claimant seeks an award of temporary total disability for the period July 3, 1990 to April 4, 1995, and permanent total disability benefits commencing on April 4, 1995 and continuing for the injury sustained to his back during the July 3, 1990 work-related accident. He alleges that he suffers from chronic pain and depression as a

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[2] Appended to Claimant's Brief are several documents which have been objected to by the Employer, namely: the supplementary neurological report of Dr. Michael Dennis, dated June 28, 1999; the report of a MRI of the lumbosacral spine, dated June 24, 1999; and a job analysis by Dr. Phillip Bussey, dated August 13, 1999. These documents were developed post hearing. The documents constitute evidence beyond the permissible scope of the Court's order at the June 7, 1999 hearing, which granted the parties leave to submit wage information, post hearing. (Tr. 231). Employer's objection to the admission of the exhibits is sustained, and the documents are hereby excluded from the record.

result of his injuries. Claimant contends that he is not a viable candidate for return to work because of: (1) his inability to communicate effectively in English; (2) his job related physical, psychological, and neurological impairments – i.e., moderate to severe depression secondary to chronic pain due to his back condition; and (3) and lack of transferrable skills. (Claimant's Brief at 5).

Employer asserts that there is suitable alternate employment for Claimant despite his alleged physical limitations, lack of transferrable skills, and limited English speaking ability. Furthermore, Employer also alleges that it is entitled to Section 8(f) relief under the Act, noting that the Director, OWCP, by letter dated March 15, 1996, has advised all parties that section 8(f) applies in this case. (See Employer's brief at 1, 31-2; EX 8).

II. Stipulations

The parties have stipulated, and based on the record evidence, I find that: (1) The Act applies, (2)the Claimant and the Employer were in an employer-employee relationship at the time of the accident/injury (3) the accident/injury arose out of and in the scope of employment, (4) timely notice of injury was given to the Employer, (5)Claimant suffered an injury on July 3, 1990, (6) the Claimant filed a timely claim,(7) medical compensation benefits in the form of temporary total disability payments from July 4, 1990 to March 25, 1996, at a rate of $241.87 per week, for a total of $72, 284.57, (EX 5), (8) an average weekly wage of $382.80, (9) and date of maximum medical improvement is April 4, 1995. (Tr. 10-12).

The Director, Office of Workers' Compensation Programs conceded that Section 8(f) applies to this case, and that the date of maximum medical improvement is April 4, 1995 (EX 8).

III. Issues

The issues remaining for resolution are:

(1) Whether Claimant is permanently partially disabled as a result of his back injury; and

(2) Claimant's post injury wage earning capacity, if any? and

(3) Whether the Employer is entitled to Section 8(f) relief.

IV. Summary of the Evidence

A. Claimant's Back Injuries

The medical evidence documents that Claimant has a history of back injuries commencing in 1980. The back injury which gives rise to this claim occurred in 1990. The relevant medical evidence relating to those injuries is as follows:

1. Claimant's July 3, 1990 Back Injury

On July 3, 1990, Claimant was admitted to National Hospital for Orthopedics and Rehabilitation (NHOR) following his work related accident, in which he feel from a ladder which malfunctioned, injured his shoulder, head, and twisted the low lumbar hip area. Over the course of his treatment at NHOR, he was under the care of Drs. Francisco Ferraz, Phillip Mondall, and Virgil Balint. Dr. Ferraz, the attending physician on his initial admission, reported that he complained of a temporary state of daze and developed significant dizziness, headaches and pains to the shoulder, arms, and joints. (CX 50, 51). Based on an x-ray and an MRI of the lumbar spine and his physical examination, Dr. Ferraz diagnosed cerebral concussion, chronic low back pain and mild ligamentous acute strain to the neck and back. (CX 50, 51; EX 7, 15).[3]

In subsequent visits, Dr. Dr. Ferraz noted Claimant's subjective complaints of pain, headaches, and inability to concentrate (EX 12; CX 50),

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[3] Dr. Ferraz referred the Claimant to Dr. Philip Mondall, on July 30, 1990, for severe low back pain with radiation to both lower extremities. Dr. Mondall's impressions were: concussion, resolved; neck strain, resolved, recurrent radiculopathy, mainly L-5 bilatlerally; status post two previous accidents with two previous laminectomies and diskectomy. Dr. Mondall opined that claimant's main problem was low back pain with bilateral sciatica. He recommended continued therapy, pain medication therapy, and an EMG which was reported as abnormal for the right lower and left lower extremity muscles supplied by S1, and the right and left lower paraspinal L4-L5 myatonia. (CX 46). See also CX 34, EX 15, and CX 31.

Dr. Virgil Balint also examined Claimant on August 30, 1990, and again on August 13, 1992, September 23, November 5, 1992,and December 8, 1992, and evaluated his back condition. The initial impression was chronic low back pain with recurrent radiculopathy, mainly at the L5-S1 level.(EX 15, CX 40, CX 41). Dr. Balint's diagnosis was post laminectomy syndrome and myofascial pain syndrome. (EX 15, at pp. 10, 20, 26).

and stated that Claimant should not return to work. He also recommended that Claimant undergo physiotherapy. (EX 12, CX 50). Claimant continued to complain of pain, dizziness and headaches through January 10, 1991. (EX 12; CX 36, 37, 38, 43). See also CX 49.

April 8, 1991, Dr. Ferraz noted continued complaints of chronic low back pain, and that Claimant walked in an arched position. He felt that Claimant could not return to work, and would only improve partially with rehabilitation. Dr. Ferraz opined that Claimant's history of low back pain, degenerative changes to the spine, multiple spinal surgeries, and herniated disc with nerve root compressions, were exacerbated by his July 1990 fall. (EX 7, CX 35). On June 3, 1991, Dr. Ferraz stated that his condition remained unchanged, and that he had been completely disabled for one year and had failed to improve. Dr. Ferraz believed that the July 1990 accident was a significant contributing factor to his present condition. (EX 12, 14; CX 32; See also CX 27). In a disability evaluation of September 16, 1991, Dr. Ferraz opined that, since Claimant's accident in 1990, he had been unable to work, or could only work with diminished capacity. Dr. Ferraz believed that Claimant was totally disabled from working, and that at best, he could perform only sedentary duties. Dr. Ferraz stated that physical examination revealed sings of lumbar radiculopathy and that Claimant presented a history and symptoms of dizziness, headaches, and neck pains. (EX 12). Subsequent examination revealed no major focal neurological deficit and neck range of motion was good. (EX 12, CX 26) In subsequent reports, Dr. Ferraz' findings on Claimant's physical examinations remained unchanged with respect to the pain, weakness, and dizziness, until 1993. (EX 12).

After physical examination on June 3, 1993, Dr. Ferraz reported that an MRI of the lumbar spine revealed postoperative changes at L4-5 area, with signs of radiculopathy, especially the right side. He also noted that Claimant had more recently started walking with a cane and had a noticeable limp. He demonstrated pain down the shin, and to the foot and the ankle, and ambulation and leg movement increased the pain. Dr. Ferraz recommended surgical treatment, and encouraged the Claimant to seek a second opinion. (EX 12)

Claimant was referred to Dr. Normal Horowitz, a neurosurgeon, for a second opinion. Dr. Horowitz's impression was failed back syndrome. He agreed with Dr. Ferraz's reading of the MRI evidence, but did not share the doctor's optimistic opinion regarding the benefits of surgery. He believe Claimant was totally disabled and that his overall impairment was the cumulative result of the three injuries (EX 7, 18; CX 19). Upon receipt of Dr. Horowitz's evaluation, Dr. Ferraz recommended conservative management (EX 12). In September of 1993, he opined that Claimant had not reached maximum medical improvement and that he was 100% disabled. After examining the Claimant, on December 14, 1993, Dr. Ferraz's impression was "[f]ailed back syndrome s/p laminectomies and discectomies at L4-L5 and L5-S1." Dr.

Ferraz could not rule out facet degenerative joint disease causing or contributing to the patient's chronic low back pain, and noted that there was evidence of a moderate to severe reactive depression secondary to the his chronic pain and disability. (EX 15, CX 17). *See also* EX 22.

Dr. Michael Dennis, a neurosurgeon, has been Claimant's primary treating physician since 1994. He first examined the Claimant on March 31, 1994. After review of his medical records, including x-rays and CT scans, and an MRI which revealed post-opeperative changes, evidence of nerve root clumping consistent with arachnoiditis at the L4-5 level, and advanced degenerative changes evident at L4-5, Dr. Dennis opined that Claimant's diagnostic studies were most consistent with scar tissue formation as opposed to a recurring organic deficit that would require surgical intervention. He referred Claimant to the National Rehabilitation Hospital for comprehensive pain management. (EX 7 at p. 21).[4] In a follow up report of February 14, 1995, Dr. Dennis opined that Claimant's symptoms represent a functional elaboration as opposed to any significant or organic underlying problems. Dr. Dennis further opined that Claimant could function in a sedentary to light occupation, where prolonged static positions, back bending, lifting, or carrying in excess of twenty pounds, are avoided. (EX 20 at pp. 6,9). Dr. Dennis further opined that maximum medical improvement has been achieved. (EX 7, CX 15; See also EX 20). On December 7, 1995, Dr. Dennis opined that Claimant's work restrictions limited him to sitting, walking, lifting, squatting, climbing, kneeling, or standing intermittently. He could sit, walk, or stand up to four hours a day, and could lift, squat, climb, and kneel up to two hours a day. He was prohibited from bending or twisting under any circumstances. Claimant could life 10-20 pounds. He could work above the shoulder and operate a motor vehicle. (EX 21, CX 14). At his deposition, Dr. Dennis elaborated further on his opinion regarding Claimant's physical capacity. In response to the question of whether he can work in a single position for four hours in any given day, Dr. Dennis replied:

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[4] Claimant was referred to the National Rehabilitation Hospital, on June 10, 1994, and was seen by Dr. Lorenz K. Y. Ng, a neurologist, who diagnosed failed back surgery with right lumbar radiculopathy at L4-L5, arachnoiditis, and chronic pain syndrome of combined radicular and myofascial origin. In a subsequent evaluation in August of 1994, he also diagnosed moderately severe depression (EX 23, at p. 3, 7). The recommended course of treatment was physical therapy, exercise and gait training. (Ex 23, at p. 3,6.) The Claimant was discharged from NRH on September 21, 1994,, due in part to "poor compliance". Dr. Ng felt that Claimant's significant language barrier contributed to his poor compliance. Dr. Dennis later explained that Claimant's poor compliance was also due, in part, to the fact that he moved to California to help his brother who was severely ill. (EX 4, at p. 12)

> No. ... the patient [s]ould be changing positions on a frequent basis, sitting no more than a maximum of four hours in any given day , or standing no more than a maximum of four hours in any given day. But further subdividing those restrictions into no more than a half hour at any given time ... none of these can be continuously (CX 4, at pp. 45-50)

Dr. Dennis further testified that the Claimant should not bend or twist, and that he should not squat more than once an hour in two hours in any given day (i.e. once in an hour), nor should he climb more than two hours in any given stretch. He explained, the two hour and four hour maximums in his December 7, 1995 functional capacity assessment were intended to mean "on an intermittent basis". He stated that "...he [Claimant] has to have definite flexibility. The implication of this is that it really has to be a sedentary occupation ..."

Claimant has been seen by Dr. Dennis every three months, primarily to have his medications monitored. His examination has not changed substantially, and he continues to complain of contracted pain. (EX 31, at pp. 22-23). Dr. Dennis explained during his deposition that his disability opinion related to the occupation Claimant was engaged in at the time of his 1990 injury. (EX 31, at p. 23-25).

On June 5, 1998, Dr. Bruce J. Ammerman conducted a neurosurgical consultation for Claimant. Dr. Ammerman opined that Claimant appears to have " . . . residuals of his underlying lumbar disc disease. There appears to be functional overlay based upon the neurologic examination. The patient does not appear to be disabled from limited, non-arduous, sedentary activity. He should avoid repeated bending, stooping, and lifting greater than 15 lbs." (EX 24, CX 7).

2. Claimant's 1986 Back Injury

On August 26, 1986, the Claimant twisted his right ankle while on the job. Following an orthopedic consultation with Dr. John McConnell, the impression was acute sprain of the anterior talofibular and calcaneofibular ligaments of the right ankle. He subsequently complained of pain along the lateral aspect of the right leg, back pain ,and pain radiating down the right lower extremity into the lateral aspect of the right calf and medial aspect of the right ankle, worse with standing, ambulating, and changing position. Dr. McConnell's impression was possible herniated nucleus pulposus (HNP) (EX 10, CX 92 and EX 11). *See also* CX 83.

On December 20, 1986, Claimant underwent right L-4,L-5 partial lumbar laminectomy, discetomy, scarrectomy, and decompression of L-5 nerve root.(EX 7). Dr. Francisco M. Ferraz, the neurosurgeon who performed the

procedures, noted significant operative area discomfort and lingering right leg pain, in reports dated December 31, 1986 and January 5, 1987.(EX 7, CX 87). On November 30, 1987, Dr. Ferraz's disability assessment was that Claimant had been totally incapacitated since December 1986 following his surgery, and he was currently able to perform light duty work. (EX 7). In numerous reports thereafter until June of 1990, Dr. Ferraz reported substantially the same status, i.e. that Claimant's symptoms of back, hip, right leg, and foot pain persisted.[5] (EX 12).

On February 18, 1987 Dr. Hung Dinh Duong examined Claimant and issued the following findings upon physical examination, neurological examination, and consideration of past medical history. Dr. Duong diagnosed lower back syndrome and post traumatic tendinitis of the right ankle. (CX 81).

On May 19, 1987, Dr. Henry L. Feffer conducted an independent disability evaluation. A physical examination revealed that Claimant walked with a drop foot gait on the right. Claimant's lumbar spine was flat and extension is restricted and uncomfortable. There was tenderness noted upon deep palpation over the L4/5 interspace. Dr. Feffer reviewed the CAT scan and myelogram taken on December 12, 1986, noting both revealed large L4/5 disc herniation on the right. Dr. Feffer opined that Claimant clearly seems to have sustained an L4/5 intervertebral disc herniation on the right in a twisting injury on August 15, 1986 when he slipped on a wet floor while he was performing custodial work at the Sheraton Washington Hotel. Dr. Feffer noted that Claimant's previous physician misinterpreted Claimant's right leg pain as a local injury to the ankle when in his opinion, the problem was one of radiating pain from Claimant's back. Dr. Feffer furthermore stated that he saw no connection between Claimant's 1989 laminectomy, which probably was performed at the lumbosacral level, and his more recent and relevant trauma of August 15, 1986, which occurred after six asymptomatic years in spite of very hard labor and involved an intervertebral disc herniation at the L4/5 interspace. Dr. Feffer noted that Claimant had a 20% temporary partial physical impairment to his body as a whole. Dr. Feffer opined, that at that time, Claimant should not work more than one full-time job. (EX 13, CX 76). Later the same year on October 7th , Dr. Feffer saw Claimant and noted his continued complaints of pain. Dr. Feffer opined that Claimant has reached maximum medical improvement. (EX 13).

3. Claimant's Back 1980 Injury

Claimant was treated by Dr. John S. Romine, from April 1979 until May of 1984, who commencing in 1980 reports a history of low back pain. On January 7, 1980, Dr. Romine diagnosed a possible rupture of the L5-S1

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[5] *See generally* EX 12.

intervertebral disc, and referred the Claimant for a lumbar myelogram. (EX 9). On January 23, 1980, Claimant underwent a laminectomy and protruded discs at both levels were removed. Dr. Romine's treatment notes disclose that Claimant continued to complain of pain in his lower back in August of 1980. In November of 1980, pain in the iliac crest and right foot were also reported, which Dr. Romine opined may have been due to the pain radiating from Claimant's lower back. (EX 9). On June 26, 1981, Dr. Romaine referred him for physical therapy. (EX 9). However, the physician noted on September 2, 1981 Claimant's continued complaints of discomfort in the lower back, particularly on the left. An x-ray failed to show any new lesions or significant degenerative abnormality in the back. Claimant continued to complain of pain, on May 18, 1982, upon squatting or bending. Dr. Romine opined that Claimant was suffering from "chronic back pain, post-laminectomy, with limited exertional tolerance." Dr. Romine, however, indicated that Claimant could be gainfully employed following vocational rehabilitation. (EX 9).

Following his surgery in 1980, Claimant apparently had numbness in the fourth toe, and on or about February of 1984, he developed symptoms of numbness in his right foot, third, fourth and fifth toes, and the plantar aspect of the right foot (EX 9, at p. 9). On April 4, 1984, Claimant complained of burning pain on the plantar aspect of the right foot. *Id*. p. 10. On May 21, 1984, Claimant was referred to Dr. F. Tod Welch, a neurosurgeon, for probable lumbar radiculopathy secondary to lumbar stenosis or spondylosis. Dr. Welch administered an EMG and CT scan, and noted abnormalities of both L4/5 and 5/S1, worse at L4/5, with obliteration of the epidural fat at the disc level consistent with disc protrusion, mild spondylitic changes in the disc joints and slight protrusion at L5/S1, and mild lumbar radiculopathy. (Ex 9, at p. 22).

B. Claimant's Psychological Impairment

On November 9, 1991, Claimant was admitted to a mental health facility following a suicide attempt. (CX 25). In April of 1991, Dr. Chan Dang-Vu treated the Claimant following his 1990 injury for his initial complaints of insomnia, memory loss, and inability to concentrate. His diagnosis was Post Traumatic (Concussive) disorder, a condition commonly seen in people who have experienced traumatic accidents. Dr. Dang-Vu reported that over subsequent visits, the Claimant had become increasing despondent over his chronic backache and sciatica pain, his deteriorating physical abilities, and his inability to work. Dr. Dang-Vu noted that Claimant's perception that he is no longer the "breadwinner", and subsequent depression, led to his suicide attempt in November 1991. (CX 23). Dr. Dang Vu treated the Claimant for his depression with medication and bi-weekly psychotherapy.

On April 19, 1999, Dr Brian Schulman, a psychiatrist, examined Claimant, conducted an extensive review of his past medical history, and evaluated his medical condition. Dr. Schulman opined that Claimant had a

number of adjustment difficulties related to the cumulative effect of his multiple lifetime injuries, traumas, including pre-existing back pain. The doctor indicated that the Claimant seemed to have stabilized psychiatrically in 1994, although he continued to have relational problems and concerns about his inability to return to gainful employment. Based on his clinical psychiatric examination, his impression was Adjustment Disorder (resolved), Dysthymia (currently in partial remission). He indicated that Mr. Bach has evidence of mild chronic depression and chronic back and leg pain. Dr. Schulman rated Claimant's psychiatric impairment as mild (Class II) under the Guides to the Evaluation of Permanent Impairment, 4th Edition (EX 29), and opined that he could be gainfully employed. (EX 29, at p. 14-15)

C. Vocational Evidence

On November 22, 1995, a vocational assessment of the Claimant was prepared by Comprehensive Rehabilitation Associates ("CRA"). (EX 25, at p. 4) The Claimant's prior work history, vocational interests, education, and training, and Dr. Dennis' medical restrictions of December 7, 1995 were considered. Based on Dr. Dennis' functional capacity statement in 1995, and the definition of light duty work provided by the Department of labor, and certain transferrable skills, [6] six jobs were identified by DOT Code as viable employment alternatives: shoe repairer (365.361-014); security officer (372.667-034); parking lot attendant (915.473-010); host/cashier (310.137-010); guest services/Clerk (238.367-038); and dispatcher (239.167-014)(EX 25).

In a labor market survey dated February 2, 1996, CRA Managed Care, Inc. listed four positions as suitable alternate employment for Claimant: shoe repairer, security officer [7], parking lot attendant, and host/cashier.

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[6] CRA's vocational consultants' determination relating to transferrable skills based on his past work experience and education was rebutted by Claimant's vocational expert. For example, the Dr. Bussey testified that the ability to work with and supervise others is a transferrable skill, but it does not transfer to sedentary work or any job mentioned by Ms. Walsh. Other factors considered by Ms. Walsh in identifying what she believed to be viable employment alternatives were, in Dr. Bussey's opinion, irrelevant given the lapse of almost twenty years since the Claimant had such past work experience. Still other factors considered by Ms. Walsh applied equally to semi-skilled and unskilled jobs, and were not relevant to transferrable skills analyses. (Tr. 213)

[7] The survey determined that security officers are hired for surveillance system monitoring by certain firms and a general description of

These positions were selected based on the assumption that the physical demands of the jobs were consistent with Dr. Dennis' medical restrictions, which were read to allow sedentary to light duty work with the ability to change position intermittently, and no lifting, pushing, or pulling over 20 pounds. Two refinishing positions (piano refinisher and fire restoration assistant) were also listed. Neither was identified by DOT code, nor were descriptions of the physical requirements of the positions given. The piano refinisher position required the incumbent to finish or refinish damaged or worn woodwork using spatula, putty knife, sandpaper and solvents.[8] The fire restoration assistant's duties required the incumbent to assist a crew with treating carpets, walls, drapes, following fires and water damage with various cleaning solutions and machines.[9] (CX 13).

On February 12, 1996, Marcia G. Josephson, a rehabilitation counselor, interviewed the Claimant and prepared a rehabilitation report. After considering the Claimant's occupational, medical, and educational histories, including his matriculation at San Juan College in Farmington, New Mexico for one year and receipt of a certification as a Machinist. Ms. Josephson observed that Mr. Bach walked with a cane and appeared to be frail. She also indicated that he was extremely difficult to communicate with, that his speech is heavily accented and difficult to follow, and that his failure to maintain eye contact when speaking or listening exacerbated the communication difficulties. She thought he understood English better than he spoke it. Finally, she noted that Claimant presented a flat affect which correlated to his diagnosed state of depression. Her evaluation for success was "very guarded", given her assessment that Mr. Bach presented with a myriad of physical and emotional problems as well as limited verbal skills (English). (CX 11).

In a vocational rehabilitation report dated March 21, 1996, Ms.

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the job was provided, with a notation that the specifics of the jobs generally depend on the contracts obtained by individual companies. However, no information was provided regarding the contract specifications for the jobs with the companies listed in the labor market surveys. No specific jobs were identified as available, and the number of available vacancies which would have involved solely surveillance monitoring was not provided. Finally, while the survey indicated that a sample job analysis was enclosed, that document was not submitted as a part of the record herein.

[8] It was not clear if the incumbent would be required to move the piano, disassemble or reassemble parts of the piano, in order to properly finish the surfaces.

[9] No indication was given as to whether the incumbent would be required to engage in any lifting, and if so, the frequency rate and the weight, or whether the option of working seated/and standing for periods of no longer than 30 minutes was feasible.

Josephson recommended that Claimant's file be closed because of his: (1) inability to effectively communicate in English; (2) continuing moderate to severe depression secondary to his chronic pain; (3) ongoing complaints of pain and inability to function; and (4) treating physicians's opinion that it is unlikely that he could ever return to active employment. For the reasons enumerated, Ms. Josephson opined that the Claimant's physical and mental problems, combined with his limited English speaking skills, frail appearance and affect, and severely limited transferable skills, create a work candidate with little or no chance of finding and keeping employment. (CX 10).

In a letter dated November 22, 1996, Gericel Escueta, a Rehabilitation Specialist with the Office of Workers' Compensation Programs, noted Mr. Bach's ongoing complaints of pain and an inability to function, and that his treating physician indicated it was unlikely he could return to active employment, in part, based on a lack of verbal skills. With respect to further vocational rehabilitation, Ms Escueta stated that Claimant would not benefit from such and "we will not be able to return him to a suitable alternate job...." (CX 9).

In a labor market survey dated April 6, 1999, Ms. Karen Walsh, a vocational rehabilitation counselor with CRA, reviewed Claimant's medical information, and noted Dr. Dennis's medical restrictions for work, including the limitation on prolonged static position, bending or lifting/carrying over 20 pounds. Ms. Walsh indicated that she spoke with Mr. Bill Carr, Claimant's supervisor at the Pentagon, who informed her that Claimant was capable of accomplishing his required duties pursuant to verbal or written instruction. Ms. Walsh concluded that Claimant was able to complete written and oral testing with few questions. She did not however identify tests administered or the test scores. She also concluded that Claimant could speak English, and understand English in written or oral format. A Transferable Skills Analysis was also conducted, and the following job categories, were identified by Ms. Walsh as suitable alternate employment for Claimant. (EX 27, CX 3)

Job Title	DOT Code	Physical Demands
Security Guard	238.362-014[10]	Sedentary/Light
Driver	913.663-010[11]	Sedentary/Light

[10] This job code corresponds to the job title of reservationist clerk and not security officer.

[11] This DOT code corresponds to the job title of chauffeur which includes such duties as driving automobile to transport office personnel and visitors of commercial or industrial establishment, performing miscellaneous errands, such as carrying mail to and from post office, cleaning vehicle and

Lot Attendant	915.583-010	Sedentary/Light
Parking Attendant	915.473-010	Sedentary/Light

Ms Walsh identified three security companies which hire security guards on a continuous basis. She indicated that each company has various contracts in the area and each with different job requirements. Some jobs are sedentary and some are light. (CX 3)
She also identified lot attendant positions, driver jobs, and parking lot attendant jobs. The specific physical requirements of the jobs were not listed and she did not explain how she arrived at her determination that the jobs she contends are appropriate for the Claimant as sedentary differed from the jobs described in the corresponding DOT Code as light or medium strength category.

On April 19, 1999, Ms. Walsh prepared an Addendum to Employer's labor market survey, listing additional employment opportunities for Claimant, which included positions identified by CRA in its February 1996 labor market survey. The jobs included security guard, security monitor, driver, lot attendant, and shoe repair person. (EX 28, CX 2). The jobs listed the location, a very brief description of the job, and hourly wage. However, the specific physical requirements were not listed. (EX 28, CX 2).

At the hearing, Ms. Walsh testified that she also identified jobs which were available between April 25, 1999 and May 28, 1999 – attendant at self park lot with Parking Management Inc., Diplomat Parking, and Kinney Systems, as well as lots attendant positions at Enterprise Rent A Car, Maryland Motors, Saturn of Alexandria, Kuhn's of Onasis, and driving positions at Hertz, American Medical Laboratories and Barwood Taxi.

Dr. Phillip Bussey, a vocational rehabilitation counselor testified at the hearing. (Tr. 64). Dr. Bussey has a PhD in rehabilitation counseling, and has been a vocational a rehabilitation counselor for thirty years. (Tr. 66) Dr. Bussey testified that he reviewed the Claimant's medical records

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making minor repairs or adjustments. The strength requirements for this job are listed as light.

Also included in Ms. Walsh's analysis under this DOT code, however, are positions as drivers of minibuses, vans, or lightweight trucks to transport clients, trainees, or company personnel, which fall under the DOT code 913.663-018. These jobs also may involve cleaning and servicing vehicles with fuel, lubricants, and accessories, and other duties when not driving, such as custodial and building maintenance tasks. This job code corresponds to the job title for shuttle bus or van driver and is classified in the DOT as a job involving medium strength requirements.

The remaining jobs identified by Ms. Walsh fall within the DOT strength category of "light".

and interviewed the Claimant, who described limitations of daily activity which put him at the sedentary level (Tr. 73). He also reviewed the surveillance tapes, Dr. Dennis' functional capacity assessment of 1995, which placed the Claimant in the light to sedentary work range (Tr. 76), and Dr. Dennis' later testimony during his deposition which indicated a residual functional capacity for sedentary work, alternate sitting/standing, no bending, twisting, and occasional sitting (Tr. 76), and Dr. Ammerman's June 1998 functional capacity evaluation at the sedentary work level, with restrictions on lifting more than 15 pounds, and no repetitive bending or stooping.

Mr. Bussey concluded that the more recent residual functional capacity assessments are for sedentary work activity with restrictions (Tr. 77). Mr. Bussey was of the opinion that considering the Claimant's physical restrictions, advanced vocational age, work background, language skills, none of the jobs included in the labor market surveys were suitable or appropriate for the Claimant. (Tr. 82-83).

Mr. Bussey testified that the driver jobs listed in the April 19, 1999 job market survey were defined at the light exertional level (Tr. 86) Some involved lifting as a usual and customary duty. Similarly the lot attendant job also involves work at the light level. The shoe repair job is light work and Claimant has no relevant skills for such work. (Tr. 86-87) Dr. Bussey testified that he would have to learn the job from scratch – the training period would approach a year. (Tr.92)

According to Dr. Bussey, other jobs involve driving and walking which take the job out of the sedentary level. Some , i.e. Supper Shuttle driver, involve lifting. (Tr. 88) The two chauffeur jobs were identified – one was a self employment situation, and the other for the Secretary, Housing and Urban Development. Claimant would not qualify for the later position, since he had no prior experience and does not hold a commercial license. (Tr. 212)

Mr Bussey testified that the parking lot jobs in the February 1996 survey involve light exertion, not sedentary (Tr. 92-93). He also testified, for example, that the Park and Ready job would not involve sitting four hours as indicated in Dr. Dennis' medical restrictions. Rather it is a busy job, physically active and would allow for sitting only occasionally, and require standing more than six hours a day. (Tr. 212) Hosting and cashier would required English communication skills which he does not have, and the jobs are light work.

Dr. Bussey concluded that from a rehabilitative perspective, Mr. Bach is not employable on a full time basis in the labor market in which he lives. He further opined that there is no reasonably stable market for Claimant's skills. (Tr. 87-89)

DISCUSSION

In arriving at a decision in this matter, the administrative law judge is entitled to determine the credibility of the witnesses, to weigh the evidence, and draw her own inferences from it; and she is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmer's Association, Incorporated*, 390 U.S. 459 (1968); *reh'g denied*, 391 U.S. 929 (1968). Moreover, the administrative law judge, as finder of fact, is entitled to consider all credible inferences and can consider any part of an experts testimony or she may reject it completely. See generally *Avondale Shipyards, Incorporated v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Circuit 1990). The Longshore and Harbor Workers' Compensation Act is to be liberally construed, *Director, OWCP v. Pirini N. River Associates*, 459 U.S. 297, 315-16 (1983), and claimants are to be accorded the benefit of all doubts. *Durrah v. WMATA*, 760 F.2d 320 (D.C. Circuit 1968); *Strachan Shipping Company v. Shea*, 406 F.2d 521 (5th Circuit 1969), cert. denied, 395 U.S. 921 (1970).

The parties have stipulated, and evidence of record documents that: Claimant injured his back in the course of his employment; Employer had timely notice of such injury, and authorized medical care and treatment, and has paid compensation benefits to Claimant for his periods of temporary total disability resulting from the injury, and Claimant timely filed benefits once a dispute arose between the parties. The Director, OWCP also concedes that Section 8(f) applies to this claim. Thus, the sole issue is the nature and extent of Claimant's disability.

I. Nature and Extent of Disability

In order to establish its prima facie case, the claimant has the initial burden of proving the inability to return to his former work. *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985); *Huningman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978). Claimant need not establish that he cannot return to any employment, only that he cannot return to his former employment. *Elliott v. C & P Tel. Co.*, 16 BRBS 89 (1984). The claimant's credible complaints of pain may be enough to meet this burden. *Anderson v. Todd Shipyard Corp.*, 22 BRBS 20 (1989); *Richardson v. Safeway Stores*, 14 BRBS 855 (1982); *Miranda v. Excavation Constr.*, 13 BRBS 882, 884 (1981). On the other hand a judge may find an employee able to do his usual work despite his complaints of pain, numbness and weakness, when a physician finds no functional impairment. *Peterson v. Washington Metro Area Transit Auth.*, 13 BRBS 891 (1981).

I find that Claimant has demonstrated his *prima facie* case of disability based on the medical evidence and testimony herein, and Claimant cannot return to his usual employment due to his current disability as

determined, in part, by Drs. Ferraz, Ammerman, and Dennis.

II. Permanent Disability

The concept of disability under the Act is based on two classifications: (1) the nature or duration of disability (temporary or permanent); and (2) the degree of disability (total or partial). 33 U.S.C. 908(a)-(e). *Palombo v. Director, OWCP*, 937 F.2d 70, 76 (2d Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 312 (D.C. Cir. 1991). Temporary and permanent go to the nature of the disability; total and partial to the degree of disability. The degree of disability is determined not only on the basis of physical condition, but also on such factors as age, education, employment history rehabilitative potential, and availability of work the claimant can do. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F. 2d 1031 (5th Cir. 1981); *Odom Construction Co., v. U.S. Department of Labor*, 622 F. 2d 110, 115 (5th Cir. 1980), *cert. denied*, 450 U.S. 966, 101 S. Ct. 1482, 67 L. Ed. 2d 614 (1981).

Permanent disability is defined as one that continues for a lengthy period of time and that appears to be of indefinite duration. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *petition for reh'g denied sub nom*, *Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968)(*per curiam*), *cert. denied*, 394 U.S. 976 (1969). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981). The traditional method of determining whether injury is permanent is the date of maximum medical improvement. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 60 (1985).[12] The date of maximum medical improvement is a question of fact based on the medical evidence of record. The parties stipulate and I find that the Claimant reached maximum medical improvement on April 4, 1995. An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. *Trask*, *supra; Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122 (5th Cir. 1994), *aff'g*, 27 BRBS 192 (1993). I further find, based on Dr. Dennis' opinion that Claimant has a residual disability which precludes him from engaging in exertional activity which exceeds sedentary work. This finding is consistent with the opinions of Drs. Ammerman and the earlier opinion of Dr. Ferraz. Specifically, I find Claimant is limited to sedentary work, with restrictions on sitting and standing no more than one half hour at any given time, and no more than four hours in a given day. I further find that he needs the flexibility to change positions on a frequent basis, and restricted from any bending or twisting. Claimant should not squat more

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[12] Maximum medical improvement is that point in time which separates temporary from permanent disability, not total from partial disability. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT) (D.C. Cir. 1990), *rev'g in part Berkstresser v. Washington Metropolitan Area Transit Authority,* 16 BRBS 231 (1984), and *rev'g on other grounds* 22 BRBS 280 (1989).

than once in an hour and no more than two hours a day. Claimant also has restrictions on climbing.

III. Suitable Alternate Employment

While maximum medical improvement is an indication of the permanency of disability, the availability of suitable alternate employment is an indication of the degree of disability. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1990), *rev'g Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155 (1989), *cert. denied*, 498 U.S. 1073 (1991). *See also Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT) (D.C. Cir. 1990). Where it is undisputed that claimant cannot return to his usual work, as in the instant case, the burden shifts to employer to establish the availability of suitable alternate employment. *Caudill v. Sea Tac Alaska Shipbuilding, Inc.*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993); *Larsen v. Golten Marine Co.*, 19 BRBS 54 (1986). An employer must show the existence of realistically available job opportunities within the geographical area where the employee resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *Lucus v. Louisiana Insurance Guaranty Association*, 28 BRBS 1 (1994). If the employer shows the availability of suitable alternate employment, the burden shifts to the claimant to prove a diligent search and willingness to work. *Williams v. Halter Marine Services*, 19 BRBS 248 (1987).

The Employer has identified, through its vocational experts', six positions it contends represent viable employment alternatives which were available and which the Claimant could perform, given his physical restrictions.[13] Those positions are listed as follows, along with the respective Dictionary of Occupational Titles Codes and strength levels of each position:

Title	Code	Strength Requirement
Shoe Repairer	365.361-014	Light
Security Officer	372.667-034	Light
Host/Cashier	310.137-010	Light
Driver	913.663-010	Light
Lot Attendant	915.583-010	Light
Parking Attendant	915.473-010	Light

[13] Employer's labor market surveys are based upon the restrictions of Dr. Dennis who has indicated that Claimant can work in sedentary/light capacity, with a lift restriction of 20 pounds. However, Dr. Dennis indicated in his deposition that the limitations set forth in his functional capacity evaluation which Employer's vocational rehabilitation specialists relied upon allowed to Claimant to work at the sedentary occupational level.

Based on Dr. Dennis' assessment of the Claimant's physical capacity to engage in work activity, I find that the strength requirements of the above jobs exceed Claimant's residual functional capacity. In addition, the dispatcher and guest services job codes were listed as positions which might realistically represent a viable employment alternatives for the Claimant. However, since none of the labor market surveys indicated the availability of either position, neither job is considered to be suitable alternate employment.

The shoe repair jobs, according to the Employer, does not require heavy lifting and would allow the employee to change positions as needed (EX 25, at p. 12). The position does require previous shoe repair experience, except in one case where prior experience is preferred. Claimant does not have relevant recent past work experience which would qualify him for this position. While he worked in a shoe factory prior to 1985, Dr. Bussey testified that past work experience would not be relevant since it occurred more than fifteen years ago. Moreover, according to Dr. Bussey, Claimant would not be able to learn the job within 30-60 days, but rather in rehabilitative centers the training period would approach a year. Dr. Bussey's rationale for excluding such work experience from the vocational determination of transferrable skills is reasonable and most persuasive. The shoe repairer job would also not be a suitable realistic job opportunity for the Claimant because it requires physical demands at the light level. Further, Ms. Walsh did not verify with the employers whether there existed the flexibility on the job to allow the Claimant to work within the restrictions testified to by Dr. Dennis at his deposition on March 24, 1999. Thus, the shoe repairer job cannot be considered a job the Claimant could perform.

The parking attendant position also involves work at the light exertional level, and is therefore outside Claimant's physical restrictions. Employer's vocational specialist concluded that the position does not require a good deal of physical exertion and it appears that Claimant would be able to sit, stand, and walk alternately. She reached this conclusion, however, without the benefit of Dr. Dennis' testimony that neither activity should be engaged in for more than one half hour at a time. She also included the job in the survey based on the assumption that Claimant's past supervisory experience was a transferrable skill, and that dealing with customers would not be difficult for him. Dr. Bussey testified, however, that the parking lot attendant job involved light, not sedentary work. In some locations, he indicated that the job was a busy, physically active one, which would allow Claimant to sit only occasionally and require him to stand more than six hours a day. Ms. Walsh testified that the jobs she identified as available for the Claimant would be limited to self-park lots and would exclude valet parking lots. She did not, however, identify specific locations where self park job opportunities existed or the precise number of such opportunities during the relevant

period. The position of Security Guard also requires light physical demands. The position, as described in the DOT, requires language skills which the Claimant does not have. See DOT Code 372-667-034, GOE requirements of the job.

Mr. Bach testified that he has limited ability to read English, and I find his testimony to be credible on this point. It is not clear the extent to which he may be able write in English. However, my observation of his grasp of the language at the hearing leads me to conclude, that while he understood the spoken word, with some effort, he does not have the facility for speaking the language which satisfies the criteria set forth in the DOT. Often times Mr. Bach spoke using improper sentence structure, with below average pronunciation, and poor clarity. It is my belief after review of the evidence, and based upon my own assessment of the Claimant during the hearing that Claimant would not be able to effectively communicate and perform his duties because of his limited command of the English language.[14]

Furthermore, assuming as Ms. Walsh testified, she excluded armed security guards from the labor market survey and limited her consideration to security monitoring positions, she did not identify the specific number of jobs which fell into this category, nor did she clarify the degree to which these positions involved any walking or patrolling. Therefore, these jobs are not deemed suitable as alternate employment for Claimant.

To the extent that the host/cashier (310.137-010) this job involves the supervision and coordination of activities and personnel to provide fast and courteous service to guests, and adjusting customer complaints, Mr. Bussey testified that his limited verbal skills in English would render him unable to successfully perform this job. Dr. Bussey's assessment of Claimant's language skills is corroborated by the opinion of Ms. Josephson, rehabilitation counselor. Mr. Bussey testified that the Claimant may understand English more than he can communicate it, and would be limited to jobs requiring very simple and limited contact with English speaking

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[14] During the hearing Claimant's expert, Dr. Bussey, testified that Claimant understands more English than he can communicate, but due to his speaking ability he would have to recommend only a position that "involved little contact beyond very simple contact with English speaking persons." On March 21, 1996, Ms. Josephson reported similar difficulties with Claimant's speaking ability when she noted that Claimant had an ". . . inability to effectively communicate in English." After witnessing Claimant's speaking ability at the hearing I must concur with their analysis of Claimant's speaking ability. I cannot agree with Ms. Walsh's assessment of Claimant's verbal ability to use English, and find that her April 6, 1999 report focuses more on his ability to take orders, follow instructions, and otherwise understand English.

persons. Mr. Bussey opined that he did not have any transferrable skills from past employment that qualify him for light work in today's labor market (Tr. 48). Claimant's past work experience as a supervisor was more than fifteen years ago, and is an unrealistic measure of his capabilities now at his advanced vocational age, and educational background. Further, according to the Claimant, his orders on the military base in Vietnam, when he did supervise personnel, were received in Vietnamese, and he was required to use little English in performing his duties in training civilian personnel.

The driver job (DOT Code 913.663-010) is the chauffeur job in any industry and is classified as a job requiring light physical demands. A separate DOT Code is applicable to van/shuttle bus driver (DOT Code 913-663-018) which is classified as a medium strength job, and still another DOT code applies to taxi cab driver (DOT Code 913-463-018) which is also a medium strength job. The armored car driver falls under yet another DOT Code (372-563-010) and is also a medium strength job, which involves not only driving the van, transporting the cash and valuables, but also carrying bags of cash. None of these driver classifications involve work which falls within Claimant's medical restrictions. As Dr. Bussey indicated these positions involve lifting as a usual and customary duty. Contrary to Ms. Walsh's testimony, these jobs may also require sitting more than thirty minutes in any one hour span of time, and would be inappropriate to the Claimant to perform under Dr. Dennis' medical restrictions.

The lot attendant job (DOT Code 915.583-010) is a job of light exertional demands. Some of these jobs require cleaning, detailing, and preparing cars for delivery to the customer. I find it more probable than not that such duties would require bending and stooping/squatting which he cannot do under Dr. Dennis' medical restrictions. For these reasons, I also find this job to be inappropriate as suitable alternate employment.

In view of the foregoing, I cannot accept the results of the Labor Market Surveys, as none of the jobs identified appear to be within the Claimant's medical restrictions. For the positions which are questionable, I am simply unable to determine based on this closed record whether the jobs constitute, as a matter law, suitable alternative employment or realistic job opportunities. *see Armand v. American Marine Corporation,* 21 BRBS 305, 311, 312 (1988); *Horton v. General Dynamics Corp.*, 20 BRBS 99 (1987).

In conclusion, I find that Claimant is totally and permanently disabled, and is entitled to such disability benefits from April 4, 1995 and continuing.

V. Average Weekly Wage

The parties stipulated to an average weekly wage of $382.80. Based on the evidence of record and their stipulation, I find this to be the Claimant's post injury average weekly wage.

VI. Section 8(f) Relief

Section 8(f) of the Act limits the employer's liability to 104 weeks of payments in cases in which an employee having an existing permanent total disability suffers a second injury which renders him totally disabled. 33 u.S.C. §908(f)(1); thereafter, the Special Fund makes the compensation payments. Section 8(f) is invoked in situations where a work-related injury combines with a pre-existing partial disability to result in greater permanent disability than would have been caused by the injury alone. *Lockheed Shipbuilding v. Director OWCP,* 951 F. 2d 1143, 1144, 25 BRBS 85 (CRT) (9th Cir. 1991). Section 8(f) was established to prevent discrimination against disabled workers. *Director, OWCP v. Campbell Indus*., 678 F.2d 836, 839, 14 BRBS 974 (9th Cir. 1982), rev'g *Lostaunau v. Campbell Indus*., 13 BRBS 227 (1981), cert. denied, 459 U.S. 1104 (1983), and a liberal application of the section has been held to be in keeping with Congressional intent. Maryland Shipbuilding and Dry Dock v. Director, OWCP, 618 F. 2d 1082, 12 BRBS 77 (4th Cir. 1980).

To qualify for Section 8(f) relief, an employer must make a three-part showing that: (i) the employee had a pre-existing permanent partial disability; (ii) the partial disability was manifest to the employer, and (iii) it rendered the second injury more serious than it otherwise would have been. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 309, 24 BRBS 69 (CRT) D.C. Cir. 1990), *rev'g* 16 BRBS 231 (1984), 22 BRBS 280 (1989). I find that

Section 8(f) does apply in the instant matter for the reasons stated below.

1. Pre-existing Partial Disability

Section 8(f) is invoked in situations where a work-related injury combines with a pre-existing partial disability to result in greater permanent disability than would have been caused by the injury alone. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1144, 25 BRBS 85 (CRT) (9th Cir. 1991).

An often-cited definition of "existing permanent partial disability" under Section 8(f) is:

> [t]o summarize, the term 'disability' in new [post- 1972] §§ 8(f) can be economic disability under §§ 8(c)(21) or one of the scheduled losses

> specified in §§ 8(c)(1)-(20), but it is not limited to those cases alone. 'Disability' under new Section 8(f) is necessarily of sufficient breadth to encompass those cases, like that before us, wherein the employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability.

C & P Telephone Company v. Director, OWCP [Glover], 564 F.2d 503, 513 (D.C. Cir. 1977). The weight of the medical evidence in this record more than amply establishes that the Claimant failed to completely recover from previous back injuries. He suffered from chronic back pain and disc disease which constituted such a serious disability that a "cautious employer" would have been motivated to discharge or not to hire him. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1145-46, 25 BRBS 85 (CRT) (9th Cir. 1991). Moreover, a pre-existing disability need not be economic in nature, or require that the claimant change his job, or suffer a loss in income, or have caused any functional impairment.

The permanent partial disability must predate the employment-related injury. *Mikell v. Savannah Shipyard Co.*, 26 BRBS 32, 37 (1992). The mere fact of past injury, however, does not itself establish disability. Rather, "[t]here must exist, as a result of that injury, some serious, lasting physical problem." *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1145-46, 25 BRBS 85 (CRT) (9th Cir. 1991) (where there is both evidence of complete recovery from a prior back injury and evidence of permanent partial disability, the ALJ must decide the issue of seriousness); *Director, OWCP v. Belcher Erectors*, 770 F.2d 1220, 1222, 17 BRBS 146, 149 (CRT) (D.C. Cir. 1985).

Claimant’s history of prior back injuries and debilitating chronic back pain is well documented. Claimant suffered two back injuries with two separate employers in 1979 and 1986. Following Claimant’s 1979 injury, Dr. Romine had opportunity to see him a number of times. In 1981, a series of visits in particular demonstrate the continuing problems Claimant had with his lower back. Despite the treatment Claimant continued to complain of pain in his lower back. (EX 9).

From that time forward, the medical evidence documents Claimant's continuing complaints of pain and discomfort. He sustained a second injury in 1986 involving an intervetebral disc herniation at the L4-5 interspace, which resulted in a partial lumbar laminectomy, discetomy, and decompression of L-5 nerve root. The December 20, 1986, post operative surgery note indicated that Claimant had suffered a herniated nucleus pulposus in Claimant's lower back. Following the surgery, on November 30, 1987, Dr. Ferraz executed a disability certificate in which he noted that Claimant had been under his care since December 1986. Dr. Ferraz noted that Claimant was totally incapacitated during that time frame, but that Claimant was able to perform light duty work. Claimant's work prior to his injury involved medium to heavy labor.

His complaints of chronic back persisted, and on July 1990 he fell, while in the employ of the Respondent herein, again injuring his back. Drs. Ferraz and Horowitz diagnosed failed back syndrome after three years of treatment without any abatement in Claimant's complaints of pain. Dr. Horowitz found Claimant to be totally disabled and that his overall impairment was the cumulative result of the three back injuries. surgery was performed on Claimant. (EX 7).

Based on the totality of the evidence in this record, the conclusion is inescapable that the Claimant had a pre-existing partial disability resultant from his failed back syndrome, prior to the job related injury of 1990.

2. Injury was Manifest to Employer.

The injury must have been manifest to the Employer, prior to the on the job injury. A pre-existing impairment is manifest to the employer if it knew or could have discovered the impairment prior to the second injury. *Lowry v. Williamette Iron & Steel Co.*, 11 BRBS 372 (1979) The mere existence or availability of records showing the impairment is sufficient notice to meet the manifest requirement. *Menacho v. General Dynamics Corp*., 12 BRBS 790, 792 (1980); *Delinski v. Brandt Airflex Corp*., 9 BRBS 206, 211 (1978). The pre-existing disability need not be manifest at the time of hiring, but only at the time of the compensable subsequent injuy. *Director, OWCP v. Cargill, Inc.* 709 F.2d 616, 619, 16 BRBS 137 (CRT) (9th CIr. 1983)(en banc). This requirement is satisfied by the extensive medical documentation of the Claimant's prior back injuries. Even though the Employer did not have actual knowledge of those conditions, it is sufficient that the conditions could have been established by a review of the Claimant's medical records. See *Lowry v. Williamette Iron and Steel Co, et al.*, 11 BRBS 372, 375 (1979).

3. Substantial Contribution of Prior Injury

Where a claimant is permanently partially disabled, employer must prove that the claimant's current level of disability is "materially and

substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. §§ 908(f)(1). *See Sproull v. Director, OWCP*, 86 F.3d 895 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 133 (1997); *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884 (5th Cir. 1997)(following the rational in Two R Drilling); *Director, OWCP v. Ingalls Shipbuilding, Inc.*, 125 F.3d 303, 306 (5th Cir. 1997); *Director v. Newport News Shipbuilding & Dry Dock Co.[Harcum]*, 8 F.3d 175, 27 BRBS 116 (CRT) (4th Cir. 1993), *aff'd on other grounds*, 514 U.S. 122 (1995), 131 F.3d 1079 (4th Cir. 1997)(vocational rehabilitation expert can prove materiality prong of the contribution element); *Two R Drilling v. Director, OWCP*, 894 F.2d 748, 750 (5th Cir. 1990)(rejecting the "Common Sense Test"); *Quan v. Marine Power & Equipment Co.*, 30 BRBS 124 (1996).

The physician opinions of record demonstrate that Claimant's prior injury not only contributed to his current condition, but created a resulting disability that was materially and substantially greater. Dr. Ferraz has noted that Claimant suffered from significant disc disease as a result of his two prior injuries. (EX 12). On April 8, 1991, Dr. Ferraz noted that the July 3 injury aggravated Claimant's preexisting condition. Dr. Horowitz made a similar finding when he opined that Claimant's condition was the result of the "accumulation" of all the Claimant's injuries. (EX 18).

The medical reports concerning Claimant's level of disability also demonstrate that Claimant's condition has substantially worsened. For instance, after Claimant's first injury, Dr. Romine's September 2, 1981 note revealed that Claimant could not squat or bend. Dr. Romine noted that when Claimant lifted a 35 kilogram object (approximately 70 pounds) it caused him pain and discomfort all afternoon and evening. Later, after Claimant's second injury on November 30, 1987, Dr. Ferraz executed a disability certificate for Claimant. Dr. Ferraz noted that Claimant was able to perform light duty work, which carries a maximum lift rating of twenty pounds. After Claimant's current job related injury, Dr. Ferraz's opinion changed and he noted the belief that Claimant was totally disabled from working, and that at best, he could perform sedentary duties only.

I find the progression illustrated by these physicians demonstrated the accumulative nature of Claimant's injuries and general worsening of Claimant's condition. I find that the previous injuries, when combined with the injury at issue, created a substantially and materially greater disability than would have existed with the current injury alone.

Interest

The Benefits Review Board has held that Claimant is entitled to appropriate interest on any accrued unpaid compensation benefits. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978), *aff'd in*

pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP, 594 F. 2d 986 (4th Cir. 19798); *Santos v. General Dynamics Corp.*, 22 BRBS 226 (1989). Accordingly, Claimant is entitled to interest on all unpaid disability benefits, beginning on the date that such benefits were due and computed at the rate prescribed by 28 U.S.C. §1961. *See Grant v. Portland Stevedoring Co.*, 16 BRBS 267, 270 (1984, *modified on recon.*,17 BRBS 20 (1985).

Attorney's Fees and Costs

Since Claimant is entitled to benefits under the Act, his attorney is entitled to a reasonable and necessary fee and costs, substantiated by an itemized fee petition. *33 U.S.C. §928*. Such fee petition must meet the requirements set forth in 20 C.F.R. §702.132 and shall be submitted within sixty (60) days of receipt of this Decision and Order. A copy of the fee petition shall be served on Respondent's counsel who shall have thirty (30) days from receipt to respond to the fee petition. The petition for approval of a fee shall identify each document by date and a description for which a charge for receipt/review/filing is made and should be listed on a line by line basis. Likewise, a separate, descriptive listing shall be made for each telephone call/conference. All other entries shall be identified on a line by line basis (when charges appear to be duplicative, such as second and subsequent entries for research, preparation, etc., petitioner shall explain the necessity for such duplication or continuing services). Any objection filed by Employer shall be specific, as opposed to general, and shall be on a line by line basis.

ORDER

It is therefore **ORDERED** that:

1. Commencing on April 4, 1995 and continuing for 104 weeks, Employer shall pay to the Claimant, Kirt Bach, permanent total disability benefits, plus applicable adjustments provided in Section 10 of the Act, based upon the stipulated average weekly wage of $382.80. The Fund shall pay compensation thereafter and continuing, until such further ORDER of this Court based on the stipulated average weekly wage. Such compensation is to be computed at the maximum weekly compensation rate of 66 2/3 per centum of the stipulated average weekly wage of $382.80;

2. The employer shall receive a credit for all amounts of compensation previously paid to the Claimant as provided above which exceeded the period of 104 weeks;

3. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this decision and order is filed with the Office of the

District Director shall be paid on all accrued benefits computed from the date each payment was originally to be paid. *See Grant v. Portland Stevedoring*, 16 BRBS 267 (1984);

4. Pursuant to Section 7 of the Act, Employer Department of the Army shall pay medical benefits related to this claim;

5. All calculations necessary to effectuate this order shall be made by the District Director.

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MOLLIE W. NEAL
Administrative Law Judge

Washington, D.C.